No. 83-463

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT STERN,
Petitioner,

-vs-

KENNETH SHOULDICE, et al.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS WHY THIS WRIT SHOULD NOT BE GRANTED

I. THE PETITIONER FAILS TO RAISE AN IMPORTANT ISSUE OF LAW.

II. APPELLANT ALSO DESIRES THIS COURT TO REVIEW THE RECORD OF THE TRIAL AND CORRECT THE LOWER COURT'S AND THE APPELLATE COURT'S FACTUAL CONCLUSIONS AS TO THE STATE OF THE PLEADINGS AND WHETHER THE PLAINTIFF VOLUNTARILY SURRENDERED A DAMAGE CLAIM DURING THE TRIAL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The above respondents, by their attorneys, Byron H. Higgins and Raymond F. Clevenger, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion and order in this case. This case is reported at *Stern* v *Shouldice*, 706 F2d 742 (1983).

Respondents adopt the opinion of the Sixth Circuit Court of Appeals.

REASONS WHY THIS WRIT SHOULD NOT BE GRANTED

I. THE PETITIONER FAILS TO RAISE AN IMPORTANT ISSUE OF LAW.

In determining whether or not an issue is of importance to the jurisprudence of the United States, the Supreme Court distinguishes between importance to the public generally and the importance of the issues to the particular parties involved in litigation. *Layne & Bowler Corp* v *Western Well Works*, 261 US 387, 393 (1923).

Petitioners seek a ruling as to whether a post-judgment motion for the award of pre-judgment interest must be filed pursuant to FR Civ P 54(d) rather than FR Civ P 59.

Although petitioner acknowledges that the award of pre-judgment interest is discretionary with the district court, petitioner argues that if the damages are liquidated, then such a motion may be filed pursuant to FR Civ P 54(d). Therefore the time for appeal under FRAP 4(a)(4) expired and the Sixth Circuit should have dismissed respondent's appeal.

The Sixth Circuit held that the distinction between liquidated and unliquidated damages was irrelevant to the

issue, since the award of pre-judgment interest in all cases is discretionary with the court. It cited two decisions to support its position. *Bricklayers' Pension Trust Fund* v *Taiariol*, 671 F2d 988, 990 (6th Cir, 1982); *Chicago & Northwestern Railway Co* v *Union Packing Co*, 527 F2d 592 (8th Cir, 1976).

There are three reasons why this petitioner does not present an important issue of law deserving of this Court's attention. Firstly, there is no split among the circuits as to this issue, nor does petitioner cite any contrary opinions to demonstrate that the circuits are divided. Secondly, even if petitioner were correct, it would not be dispositive of respondents' right of appeal under FR Civ P 4(a)(4). Finally, there is a question of whether petitioner's claim for back wages is a liquidated claim.

Petitioner's damage claim for back wages is not a liquidated claim. The cases cited by the petitioner to support his proposition are distinguishable from the instant case. The cited cases relate to contractual provisions between the parties that provide for the payment of sum certain or establish a formula for the determination of damages. See *Royal Indemnity Co* v *United States*, 313 US 289 (1941), and *Rodgers* v *United States*, 332 US 371 (1947). As the Sixth Circuit has previously held, only:

> When the amount of a claim can be ascertained readily by reference to a formula in the contract and none of the facts is in dispute or when the amount of claim itself is not disputed, the claim is liquidated. *Bituminous Casualty Corp* v *Lynn*, 503 F2d 636 (6th Cir, 1974).

In this instance the petitioner was employed on a contract with the College. He lost his employment when the contract was allowed to expire. In order to determine the amount of lost wages, it would be necessary to hear evidence relative to the amount of future compensation which petitioner would have received had he continued in the employ of the College following the termination of his

appointment and mitigation of damages. Thus the damages flowing from his discharge cannot fall under the definition of liquidated. *APO-Financial Computer Service* v *First National Bank*, 703 F2d 1261 (11th Cir, 1983); *Goodman* v *Sikorsky & Mott*, 682 F2d 44 (2nd Cir, 1982).

Nor is the issue raised on this writ dispositive of respondents' right to appeal to the district court's judgment. Several other arguments were also presented to the Sixth Circuit in support of the timeliness of the appeal. These are:

1. That the district court assured the defendant on January 30, 1981, fifteen days after the opinion was entered, that an appeal should not be filed until a judgment was entered. This effectively tolled the running of the appeal period. *Thompson* v *Immigration Service*, 375 US 84 (1964);

2. That FRAP 4(a)(4) and (6) requires that an order be entered in conformity with FR Civ P 58 and 79(a). Rule 58 provides that every judgment be on a separate document. Rule FR Civ P 79(a) requires that each order be entered on the docket book as a separate document. The opinion of the court dated January 14, 1981, although it concludes with the phrase "IT IS SO ORDERED," is not in compliance with FR Civ P 58 in that it was combined with an opinion. The title of the document entered by the district court on January 14, 1981, was simply "OPINION ON MOTIONS" and did not contain a declaration that it was an "order." Nor was it entered on the docket as an "order." The separate order which met the compliance of Fr Civ P 58 was the amended judgment entered by the court on February 12, 1981. *US* v *Indrelunas*, 411 US 216, 93 S Ct 1562, 36 L Ed 2d 202 (1972); *Huecker* v *Milburn*, 538 F2d 1241 (CA 6, 1976); *Cloyd* v *Richardson*, 510 F2d 485 (CA 6, 1975).

Thus if petitioner were to succeed, it would only result in remand to the Court of Appeals for ruling on the other issues raised by petitioner.

Therefore, petitioner has failed to submit to this Court an important issue of law of public significance worthy of this Court's time.

II. APPELLANT ALSO DESIRES THIS COURT TO REVIEW THE RECORD OF THE TRIAL AND CORRECT THE LOWER COURT'S AND THE APPELLATE COURT'S FACTUAL CONCLUSIONS AS TO THE STATE OF THE PLEADINGS AND WHETHER THE PLAINTIFF VOLUNTARILY SURRENDERED A DAMAGE CLAIM DURING THE TRIAL.

This Court has stated that "We do not grant certiorari to review evidence and discuss specific facts." *United States of America* v *Johnston*, 268 US 220, 227 (1925). The United States Supreme Court is "a court of law, . . . , rather than a court for correction of errors in fact finding, [and] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg Co* v *Linde Air Products Co*, 336 US 271, 275 (1948).

Petitioner desires this Court to review the pleadings and ascertain whether their *ad damnum* clause states a claim against the individually named defendants for lost wages. Secondly, petitioner desires this Court to review the transcript of the trial court to determine whether the petitioner surrendered any claim for damages that he might have asserted against the individually named defendants, as the Sixth Circuit found.

Clearly, this does not meet the guidelines established by the United States Supreme Court and therefore does not constitute a basis for granting a writ of certiorari.

CONCLUSION

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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